SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1970

No. [redacted] 151

MOSS DAVID POSNER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

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MOSS DAVID POSNER,
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vs.

UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of the United States District Court for the Central District of California, convicting the petitioner of a violation of the Universal Training and Service Act and sentencing him to the custody of the Attorney General.

1. OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals is not yet reported. It is set forth as Appendix A to this petition.

2. STATUTORY PROVISION SUSTAINING JURISDICTION

The judgment of the Court of Appeals was entered on March 10, 1970.[1]

This Petition for Writ of Certiorari is filed within the required thirty days time, as extended by Mr. Justice Douglas to May 9, 1970. (See Appendix C).

The jurisdiction of this Court rests on Section 1254 (1) of the Judicial Code, 28 U.S.C. The District Court had jursiidction under 18 U.S.C. §3231.

3. QUESTIONS PRESENTED AND HOW RAISED

Petitioner raises constitutional questions. They involve the Fifth Amendment clause concerning due process and the First Amendment clause concerning establishment of religion.

The First Amendment is involved in that the fact-finding agency considered him non-religious and therefore outside the law. Additionally involved here is the agency's regulation, as interpreted and applied, that a late [after an order to report for induction] crystallization of con-

1. This petitioner's Petition for Rehearing was denied by the Court of Appeals on March 10, 1970. See Appendix B to this petition.

scientious objection to military service is not a circumstance beyond his control.

The Fifth Amendment complaint, in brief, is that (1) the administrative agency made an ipse dixit conclusion, one without basis in fact, and (2) that involved here is a conflict between the Act and the agency regulation.

The questions here are doubly presented: the disposition of both a conscientious objector claim and an occupational claim, each duly made to the Selective Service System, raised in the trial court by written Motion for Judgment of Acquittal and briefed to the Court of Appeals for the Ninth Circuit.

There is a question of whether there was a *de facto* reopening of petitioner's classification by reason of the local board's examination of the merits of petitioner's claim for conscientious objector status at a hearing lasting 2 hours and 35 minutes, and whether petitioner was denied due process of law by virtue of the failure of the board to permit appeal and other procedural rights following such *de facto* reopening.

There is a question of whether it was a violation of petitioner's procedural rights, and of due process of law, to require that when petitioner waived his right to jury trial he also waive his right to special findings by the judge. Federal Rules of Criminal Procedure, Rule 23(c).

4. STATUTES AND REGULATIONS INVOLVED

Involved are the First Amendment, the Fifth Amendment, §456 (j), of the Universal Military Training and Service Act of 1951, and the agency regulation, 32 C.F.R. §§1624.1, 1624.2(e), 1625.2, 1625.13, 1625.14. They are set forth in Appendix D.

Federal Rules of Criminal Procedure, Rule 23(c), Trial Without a Jury:

> In a case tried without a jury, the court shall make a general finding and shall, in addition on request, find the fact specially. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.

5. STATEMENT OF THE CASE

The indictment charged Posner with a violation of the Universal Military Training and Service Act for refusing to submit to induction. [CT 2].

Posner pleaded Not Guilty and was tried by the Honorable E. Avery Crary, District Judge, sitting alone without a jury. He was found guilty and given a three year sentence.

6. THE FACTS

The relevant facts in this appeal are found in (1) the appellant's Selective Service file [Ex. 1 and 2][2] and in (2) the reporter's transcript of proceedings of the trial [RT][3] both being parts of the designated record on appeal.

Appellant Moss David Posner, now a 32 year old medical doctor, registered with the Selective Service System in 1954. [RT 5, Ex. 11]. The critical events of his relationship with Selective Service System may be dated from

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2. Ex. refers to the government Exhibit 1 and 2, the complete SS file of Appellant.

3. RT refers to the Reporter's Transcript of Proceedings of the trial.

1966, when he was taken out of a II-A classification [occupational] and classified I-A on May 12, 1966. [Ex. 13, RT 5].

On September 21, 1966, Appellant was classified III-A [dependent's hardship] by his Local Board.

The State Director thereafter appealed that classification and the Appeals Board classified Appellant I-A. [Ex. 13].

A request for an occupational deferment for the Appellant was made by Southern California Permanente Medical Group but his classification was not reopened. [Ex. 14].

On March 13, 1967, Appellant was sent SSS Form 252 order to report for induction on July 6, 1967. On March 14, 1967 the Local Board received a telegram from Appellant requesting SSS Form 150, Special Form for Conscientious Objectors, and said form was mailed to Appellant on March 15, 1967.

Appellant's SSS Form 150 was received by the Board on March 29, 1967. [Ex. 14].

On April 3, 1967, the Local Board rejected the Appellant's claim to a I-O conscientious objector classification.

Appellant requested a personal appearance before the Local Board and after an exchange of several letters between Appellant and Local Board [Ex. 183-211] the personal appearance was granted.

Appellant's classification was not reopened. [Ex. 212].

On August 22, 1967, Appellant Posner refused to submit to induction. [Ex. 15].

7. REASONS FOR GRANTING A WRIT

A national decision is required on two pairs of constitutional problems, ones that have left the lower courts divided.

Two First Amendment problems are presented in that the fact-finding agency considered him non-religious and concluded he was outside the law. The act and regulations, as interpreted and applied, require "religious" beliefs as an essential qualification for a conscientious objector classification and petitioner Posner was considered not qualified as being non-religious.

Additionally involved here is the agency's regulation, as interpreted and applied, that a late [after an order to report for induction] crystallization of conscientious objection to military service is not a circumstance beyond his control.

Two Fifth Amendment problems are presented: One, a conflict between the Act and the agency regulations, and Two, an interpretation of the nature of conscientious objections, an interpretation that has divided the Courts of Appeals during the last past two years, on this question: is a conscientious objection that crystallizes only after the mailing of an Order to Report for Induction, a change of status "beyond the control of the registrant," and therefore within the provided exception to the said agency "deadline" regulation?

8. ARGUMENT

Our argument is presented under several points, each of the first two containing two constitutional questions.

POINT ONE

The First Amendment Applies

There are two First Amendment problems here: (A) Whether a non-religious conscientious objector may be denied a draft classification that is available to a religious conscientious objector and (B) whether conscience, in this context, the crystallization of conscientious objections to war is a circumstance beyond a registrant's control.

A. Congress may not provide for a draft deferment to a religious registrant and deny it to a non-religious registrant.

We contend that Congress has created an impermissible distinction in awarding statutory deferments, between sincere conscientious objectors who are non-religious and those who are "religious."

We start with the assumption that there can be no valid doubt on the matter of Dr. Posner's sincerity.

We next argue that, logically, this alone should be sufficient.

Sincerity, alone, was the standard used by the British when they had conscription. [See Appendix A]. Thus, a Welsh nationalist could be classified as a conscientious objector. This is the standard currently used by the Commonwealth of Australia. [See Appendix B]. Its most pertinent paragraph says: "(5) For the purpose of this section, a conscientious belief is a conscientious belief

whether the ground of the belief is or is not of a religious character and whether the belief is or is not part of the doctrines of a religion."

Similar provisions were present when draft laws existed in Canada, New Zealand, Germany (west), the Scandinavian countries and Holland and Finland.

Sincerity, alone, is the only constitutionally permissible standard. If it be asserted that Congress may proscribe beliefs (in our context) that are solely political, economic, sociological or philosophical we reply (1) there has been no claim that Posner's beliefs were such, (2) that even if his pertinent beliefs are held to include such proscribed bases this would not taint his claim.

The Tenth Circuit so interpreted this Court's *Seeger* decision in *Fleming* v. *United States*, 10th Cir., 1965, 344 F.2d 912.

It is an impermissible preference to favor conscientious objectors who base their beliefs on religious grounds as against equally sincere beliefs held by men not claiming a religious basis for them.

We submit that the Court's establishment cases control:

Torcaso v. *Watkins*, 367 U.S. 488 (1961);
Abington School District v. *Schempp*, 374 U.S. 203, 220 (1963);
Everson v. *Board of Education*, 330 U.S. 1 (1947);
Illinois ex rel. McCollum v. *Board of Education*, 333 U.S. 203, 210-11 (1948).

The decision in *Welsh* v. *United States*, No. 76, October Term, 1969 [not known at this writing], may be dispositive of this subpoint and, if favorable to our view, of the present petition.

B. Crystallization of conscientious belief is a circumstance beyond a registrant's control.

This matter of "crystallization" has caused a division of decision in the various circuits.

The most recent case is *Ehlert* v. *United States*, 9 Cir., 1970, ... F.2d ..... The Ninth Circuit took 13 months to decide it after the oral reargument to the en banc court of ten judges. These ten judges, the opinions show, lined up 5 to 5 and only when three new judges were appointed was the final decision possible.

The dissent states a proposition not considered in any of the four opinions written by the majority and this we now argue:

Congress explicitly established conscientious objection and nowhere, even by implication, set a deadline for its presentation.

Petitioner refers to the dilemma involved in a confrontation between an Act of Congress and an agency regulation.

Congress by law clearly intended to expeditiously raise an army. But it is the will of Congress, by unequivocal expression in the law, that conscientious objectors should be exempt.

Congress declared in Section 456 (j) of the Universal Military Training and Service Act, 50 U.S.C. App., that:

> "Nothing contained in this Title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States, who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."

It is true, as an early Supreme Court decision puts it "Congress may declare its will, and after fixing a primary standard, devolve upon administrative officers the 'power to fill up the details' by prescribing administrative rules and regulations." *United States* v. *Shreveport Grain & Elevator Co.*, 287 U.S. 77, 85, 53 S.Ct. 42, 44, 77 L.Ed. 175 (1932).

Yet one of the settled portions of constitutional law is that the power conferred upon the legislature to make laws cannot be delegated by that branch of government to any other body or authority. As the Supreme Court stated it: "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution. *Field* v. *Clark*, 143 U.S. 649, 692, 12 S.Ct. 495, 504, 36 L.Ed. 294 (1892).

But the President may prescribe administrative rules upon Congressional authorization. *United States* v. *Grimaud*, 220 U.S. 506, 521, 31 S.Ct. 480, 484, 55 L.Ed. 563 (1911). It is true in modern times that this doctrine has been widening, for as Mr. Justice Douglas declared, with only Mr. Justice McReynolds dissenting: "Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility." *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 398, 60 S.Ct. 907, 914, 84 L.Ed. 1263 (1940).

Yet despite the widening, it is still a clear principle of constitutional law that the President may not legislate contrary to Congressional law.

As the Court declared in *Koshland* v. *Helvering*, 56 S.Ct. 767, 298 U.S. 441, 80 L.Ed. 1268, 105 A.L.R. 756 (1936): "Where provisions of a statute are ambiguous and its

directions specific, the statute cannot be amended by regulation." For, as the Court pointed out, "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law, but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute." *Dixon* v. *United States,* 85 S.Ct. 1301, 381 U.S. 68, 14 L.Ed.2d 223 (1965). Speaking for the Court at 1304, Mr. Justice Brennan then went on to declare: "A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity."

Pursuant to the delegated powers in the Act, regulations were adopted for administrative procedures. 10 (b) 1 of the Act provides: "The President is authorized—to prescribe the necessary rules and regulations to carry out the provisions of this title."

The regulations, promulgated by the President, provide procedures for determining the merit of claims for deferment. Those procedures provide that the registrant may ask for a face to face confrontation with the local board and, if it rejects his claim for a review of his file by the State Appeal Board. A short cut, one that does not offer him either, or both, of these avenues of relief is unlawful.

It is submitted that the provision of the Act concerning conscientious objectors is unambiguous and its direction specific.

A pertinent restatement of it is found in the Department of Defense directive to all the eleven armed services:

> ". . . the Congress, as indicated by provisions of P. L 90-40 (reference (c)) and related statutes, has deemed it more essential to respect a man's religious beliefs

than to force him to serve in the Armed Forces. . . ." [DoD Directive No. 1300.6]

It is clear that Congress put no time limit on the presentation of such a claim. Any administrative inconvenience that results from "late" filing is to be remedied by Congress, not by the agency. Every agency, and this one, certainly has administrative inconveniences and frustrations. There is no legal excuse for short cuts to avoid them, in the face of Congressional intent.

Neither the President nor his representative can nullify the will of Congress by prescribing regulations which are contrary to the intent of the statute enacted by Congress.

In regards to conscientious objectors, it is submitted that 32 C.F.R. §1625.2 is contrary to Congressional will as enacted into law and hence null and void.

Congressional policy against requiring combatant training and service of those conscientiously opposed to participation in war is one of long standing. *Seeger* v. *United States*, 380 U.S. 163 (1965). It finds its counterpart in the policy of the armed forces that conscientious objectors should be discharged from service or assigned noncombatant duty.

In regards to conscientious objectors and 32 C.F.R. §1625.2 Judge Merrill, with the four other dissenting circuit judges in *Ehlert* v. *United States,* No. 21,930, 9th Cir., February 2, 1970, concluded that "I would hold the regulation to be contrary to statute and invalid." The majority had held that a change in a registrant's status (after he had received an induction order) to that of a conscientious objector was a situation over which registrant had control, *but it did not concern itself at all* with the point we advance.

As Judge Merrill stated in *Ehlert*:

> "Legislation creating this exemption from military service, 50 U.S.C. App. §456 (j) provides for no such limitation. The enforcement of orderly procedures may well require default to be imposed for failure of a registrant to claim in timely fashion. But here the limitation is not based on procedural default. It acts upon the substance of the status itself, and serves to diminish what Congress has bestowed. I regard it as beyond the rule-making power of the System so to exclude from application of the exemption anyone who by virtue of his status is entitled to it under law; or, for reasons of expediency, to relieve itself from the onus of its clear obligation to entertain timely claims of status on the part of registrants not yet inducted into military service."

Concerning conscientious objection, it is clear that the Congressional statute states and defines the rights of the registrant and fixes a standard by which such rights are to be measured.

The regulations constitute a step in the administrative process, but they cannot alter the Congressional will as expressed by statute. *Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue*, 297 U.S. 129, 56 S.Ct. 397, 80 L.Ed. 528 (1936); *Dixon* v. *United States*, 85 S.Ct. 1301, 381 U.S. 68, 14 L.Ed.2d 223 (1965).

The President himself recognizes the authority of Congress in this regard. For example, under the Military Selective Service Act of 1967, the President realized he had not been given power to institute a random selection system to draft registrants into the armed services. Possibly because such a matter involved *all* registrants (and conscientious objection only a few). In any event the President requested Congress to change the law. The President recognized that the wise and legal course was

not to change the law by new regulations. Congress passed the Selective Service Amendment Act of 1969 (P.L. 91-124) and the President signed it on November 26, 1969.

Another example to prove the point was the seizure of the steel mills of the country by President Truman on April 8, 1952, in a labor dispute. In that situation the Supreme Court held that the President could not act contrary to Congressional will. The President had no power to seize the mills without Congressional authorization. When Congress passed the Taft-Hartley Act in 1947, Congress refused to authorize governmental seizures of property as a method of preventing work stoppages and settling labor disputes. The power that the President exercised was lawmaking power, which the Constitution vests in the Congress alone. It is the function of the President to take care that the laws be faithfully executed, not act contrary to Congressional will as expressed by law.[4] *Youngstown Co.* v. *Sawyer*, 343 U.S. 579 (1952).

In regards to exemption of conscientious objection, the will of Congress is clear. It is stated by a clear, definite, unambiguous statute.

We have the same situation in this draft case.

Once the will of Congress is expressed by law, the President can implement that will by rules and regulations. He cannot, by regulation, legislate contrary to that will.

It may be true, as Professor Kenneth Davis has pointed out (*Administrative Law Treatise*, Volume 1, Sec-

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4. Mr. Justice Frankfurter stated at page 602: "Congress has expressed its will to withhold this power [of seizure] from the President *as though it had said so* in so many words." [Italics supplied].

tion 5:09), that at certain times ascertainment of the intention of Congress in regards to a statute may be impossible. But such is not the case here.

In regards to conscientious objectors the language of the law is clear. The President by regulation cannot change substantially what Congress has willed by law. In regards to conscientious objector registrants 32 C.F.R. §1625.2 is contrary to the statute and hence invalid.

C. There is a conflict in the circuits concerning the right to a reopening upon the assertion of a claim for conscientious objection after the mailing of an order to report for induction.

Petitioner may have been denied a reopening because of the erroneous belief that crystallization of conscientious objection after receipt of an order to report for induction is not grounds for reopening. There is a conflict in the circuits on this point, and we urge that the position of the court below is erroneous.[5]

The facts in the case at bar are substantially similar to those in *United States* v. *Gearey*, 368 F.2d 144 (2d Cir. 1966), cert. denied 389 U.S. 959 (1967). In both cases the local board considered the registrant's conscientious objector claim submitted after receipt of an order to report for induction and declined to reopen the classification on the ground that the registrant was not "a genuine conscientious objector". Compare Ex. 212, and 368 F.2d at 147, n. 4. In *Gearey*, the Second Circuit remanded the case to the District Court to determine whether the local board had refused to reopen because the claim was submitted after

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5. By the recent grant of certiorari in *Ehlert* v. *United States*, ... USLW ..... (May 4, 1970), it is anticipated that this court will resolve the conflict.

the mailing of an order to report for induction. Judge Kaufman ruled as follows:

> "If the Board finds, however, that the applicant's beliefs ripened only after he received his notice, and that his beliefs qualify him for classification as a conscientious objector then a change in status would have occurred 'resulting from circumstances over which the registrant had no control,' and he would be entitled to be reclassified by the Local Board." 368 F.2d at 150.

The Second Circuit in *Gearey* recognized that the board might have determined that the claim had matured before the receipt of the order to report for induction, or never matured at all. Nevertheless, the Court felt constrained to remand because:

> "While the Board's finding that Gearey was not 'a genuine c.o.' may have been a shorthand manner of expressing one or the other of the above views, it might also have meant that the Board was refusing to reopen on the ground that Gearey had not advanced his claim before the mailing of the induction notice, even though the claim had not matured until later." 363 F.2d at 144.

The case at bar fits exactly the fact pattern in *Gearey*, and the court below should have remanded to determine whether the board had refused to reopen solely because the claim was made after petitioner received his order to report for induction.

There is, however, an explanation why the court below did not so remand. On February 2, 1970 the Ninth Circuit, *en banc*, in an 8 to 5 decision, specifically rejected the holding in *Gearey* and stated that "a crystallization of, or a change in, a registrant's views on conscientious objection is not a change in his status resulting from circumstances over which he has no control, within the mean-

ing of 32 C.F.R. §1625.2." *Ehlert* v. *United States*, ... F.2d ..... (9th Cir. No. 21,930, Feb. 2, 1970), cert. granted ..... USLW ..... (May 4, 1970).

The decision of the court of appeals in the case at bar was handed down on February 13, 1970, eleven days after *Ehlert, supra.* It must be assumed that the principle set forth in *Ehlert* governed the decision in the case at bar, and that the court below took the position that the crystallization of conscientious objection after receipt of an induction order was not grounds for reopening of a registrant's classification.[6] The opinion is vague on this point. The Court seems to treat the case as one in which there was a "personal appearance," and that the board determined that there were no grounds for reopening of the classification. It finds support for this decision in what it calls Dr. Posner's "instant reaction" to the notice to report for induction. Yet another court may have been even more critical of a delay by Dr. Posner after receipt of the order to report. The Court agreed that there was no change in Dr. Posner's status without making it clear what is necessary for such a change to have taken place.

The conflict on this question is clear. Several circuits have held that the maturing of a conscientious objector claim is not a change in status beyond the registrant's control which would provide grounds for reopening of a classification after receipt of a notice to report for induction. *United States* v. *Jennison*, 402 F.2d 51 (6th Cir. 1968); *United States* v. *Taylor*, 351 F.2d 228 (6th Cir. 1965); *United States* v. *Helm*, 386 F.2d 434 (4th Cir. 1967), cert. denied 390 U.S. 958 (1968); *Davis* v. *United States*, 374 F.2d 1, 4 (5th Cir. 1967); *Porter* v. *United States*, 334 F.2d 792

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6. See opinion below, fn. 3, and see order dated March 10, 1970, denying petition for rehearing, fn. 3.

(7th Cir. 1964); *United States* v. *Schoebel*, 201 F.2d 31 (7th Cir. 1953).

Other courts have specifically followed (or anticipated) the *Gearey* doctrine. *United States* v. *Stafford*, 389 U.S. 215 (2d Cir. 1968); *Keene* v. *United States*, 266 F.2d 378 (10th Cir. 1959); *Martinez* v. *United States*, 384 F.2d 50, 51 (10th Cir. 1967); *United States* v. *Sandbank*, 403 F.2d 38 (2nd Cir. 1968), cert. denied 394 U.S. 961 (1969). See also *Paszel* v. *Laird*, 308 F.Supp. 741, 742 (E.D.N.Y. 1969); *United States* v. *Baker*, 1 SSLR 3017 (E.D.N.Y. Feb. 9, 1968); *Murray* v. *Blatchford*, 307 F.Supp. 1038, 1055 (D.R.I. 1969); *United States* v. *Huisinga*, 300 F.Supp. 204, 208 (E.D. Ill. 1969).

The *Gearey* doctrine is correct not only on legal and procedural grounds, but on philosophical and common sense grounds as well. The human conscience is something beyond the power of control, and it is entirely conceivable that the conscience may command objection to participation in war only after an individual has received an order to report for induction. Judge Kaufman recognized this in *United States* v. *Gearey*, *supra*:

> "The realization that induction is pending, and that he may soon be asked to take another's life, may cause a young man to finally crystallize and articulate his once vague sentiments." 368 F.2d at 150.

The crystallization of conscientious objection is an act of the conscience which has nothing whatever to do with "control." This is well stated by Judge Merrill, dissenting with four other judges in the *Ehlert* decision, *supra*:

> "Conscientious objection, in truth, is a contradiction of control. Just as a conviction honestly dictated by conscience cannot be banished at the will

> of the holder, so, conversely, a belief conveniently subject to control of the holder is not conscientiously entertained."

Dr. Posner, when faced with an order to report for induction, made the final determination that he was indeed a conscientious objector, and that he must pursue his claim with the draft board. It is reasonable to expect that the conscience might not command a man to avoid the precipice until, standing on the edge and gazing into the abyss, he sees the obliteration of all the truth he has ever learned and realizes he has no choice but to turn back.

POINT TWO

The Fifth Amendment Applies

A. The Selective Service System made an ipse dixit conclusion in denying the claims of petitioner in regards to his claims for a I-O conscientious objection classification and a III-A hardship classification. Each action was without basis in fact, arbitrary and violated the Fifth Amendment rights of petitioner.

In *Dickinson* v. *United States*, 74 S.Ct. 152 (1953), at 157, the Supreme Court partially catalogued the many means by which the Local Boards could test the truthfulness of a registrant's claim, and at page 158, it denounced "dismissal of the claim solely on the basis of suspicion and speculation."

In *Dickinson* the dissenting opinion of Mr. Justice Jackson stated the holding of the Court even more explicitly, 74 S.Ct. 152 (1953), at 159:

> "Under today's decision, it is not sufficient that the board disbelieve the registrant. The Board must

find and record affirmative evidence that he has misrepresented his case. . ."

This was not done in petitioner's case.

As the United States Court of Appeals for the Fifth Circuit stated the point in a case concerning a I-O conscientious objection claim, *Williams* v. *United States*, 216 F.2d 350 (1954), at 352.

> "If there was no evidence before the board to refute the defendant's professed belief and if that belief was sincere on his part, then under the Act of Congress, he was exempt from training and service. As stated, we have found no such evidence in the record."

In petitioner's situation there is no evidence in the record to contradict his prima facie claims for a I-O or III-A classification. Rejection was a violation of due process.

Moreover, despite petitioner's prima facie claims, his classification was not reopened. By failing to reopen petitioner's classification, the Local Board deprived petitioner of administrative appellate rights. As Chief Judge Fred J. Nichol pointed out in *United States of America* v. *Clayton Arnold Melrose*, CR 68-124S, United States District Court, District of South Dakota, Southern District, on December 4, 1969:

> "The minutes of the interview on June 18, 1968, at which time the defendant appeared before the local board, state that 'The Board considered all the evidence in the file and did not reopen the classification.' By holding that it did not reopen the defendant's classification, the board precluded him from appealing its decision as the determination not to reopen is not appealable. Robertson v. United States, 404 F.2d 1141 (5th Cir. 1968). However, a reopening and consequent determination of the claim on its merits gives the

> defendant the right to appear before the board thereafter and to appeal the decision to the administrative appeal boards. Davis v. United States, *supra*. It is apparent, therefore, that the determination not to reopen is in itself a separate and distinct decision of 'independent procedural significance' even though the board may, after reopening, give the registrant the same classification as previously held. Robertson v. United States, *supra*. The board cannot actually determine the claim on its merits, decide not to reclassify the registrant, and then label its action a determination not to reopen, thereby denying the registrant precious appearance and appeal rights. Miller v. United States, 388 F.2d 973 (9th Cir. 1967).
>
> In the present instance, the Court finds that when the local board proceeded on June 18, 1968, to review 'all the evidence in the file' including that submitted following its original classification, it had reached a determination on the merits through a de facto reopening of the defendant's classification. The action of the board in labeling its determination a decision not to reopen was a denial of the defendant's procedural rights. Consequently, the order requiring him to report for induction is invalid and his refusal to comply with such order renders him guilty of no crime." Such reasoning is the contention of petitioner.

Also the Local Board did not give any rational reasons for the denial of petitioner's claims. Thus their action cannot stand. *United States* v. *Haughton*, 413 F.2d 736 (9th Cir. 1969).

B. Further the distinction of the governmental agency, the Selective Service System, between "early claimants" and "late claimants" for the conscientious objection classification is a violation of the Fifth Amendment. Congress willed by act that all sincere conscientious objectors should be exempt.

"Equal protection under the law" is a time honored concept. It is part of the Fifth Amendment despite the

fact this amendment contains no such explicit statement as does the Fourteenth Amendment. As stated in *Bolling* v. *Sharpe*, 347 U.S. 497, 499, 74 S.Ct. 693, 694 (1954):

> "The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness that 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process."

Petitioner contends that his Fifth Amendment rights of due process of law and equal protection of the law were violated by the Selective Service System, when said agency refused to grant him a conscientious objector classification as required by the law of Congress because petitioner was a "late claimant."

Not only are the several Courts of Appeal in conflict over an interpretation of the nature of conscientious objections but there is a tension between the Universal Military Training and Service Act of 1951, §456(j) as enacted into law by Congress, with its provisions for exemption of conscientious objectors, and the Regulations, 32 C.F.R. §1625.2, established by the Selective Service System. Petitioner Posner's situation so demonstrates. Under our system of jurisprudence the governmental agency's regulations (which conflict with the will of Congress enacted into law) are invalid.

POINT THREE

Since There Was a De Facto Reopening of Petitioner's Classification, the Order to Report for Induction Should Have Been Cancelled, and Petitioner Should Have Been Allowed an Appeal and All the Other Rights Flowing from a Reopening.

Another question raised by this case is whether a local board is entitled to consider a claim for conscientious

objector status on the merits, during a hearing lasting two hours and thirty-five minutes (Ex. 212), and *then* refuse to reopen a classification. It is submitted that by its extensive and intensive consideration of the merits of petitioner's claim, the draft board effected a de facto reopening of petitioner's classification, thereby entitling him to a cancellation of the order to report for induction under 32 C.F.R. §1625.14.

A. De facto reopening generally.

The significance of a reopening of a registrant's classification pursuant to 32 C.F.R. §1625.2 cannot be overstated. If the classification is reopened, the registrant is entitled to a variety of procedural rights, including the right to a personal appearance and to an appeal from an adverse determination, 32 C.F.R. §1625.13. A reopening automatically cancels any pending order to report for induction, 32 C.F.R. §1625.14.

Section 1625.2 permits a post-induction order reopening of the classification where the local board "specifically finds there has been a change in registrant's status resulting from circumstances over which the registrant had no control." This change in status determination is a threshold inquiry made by the board on the basis of the facts submitted to it. It obviously does not include an investigation into the merits of a claim for reopening, but simply a determination that this is a change in status over which the registrant had no control. Many cases have held that a claim for conscientious objection crystallizing after receipt of a notice to report for induction is such a change in status. *United States* v. *Gearey*, 368 F.2d 144 (2d Cir. 1966), cert. denied 389 U.S. 959 (1967); *United States* v. *Stafford*, 389 F.2d 215 (2d Cir. 1968); *United States* v. *Sandbank*, 403 F.2d 38 (2d Cir. 1968), cert. denied 394 U.S.

961 (1969); *Keene* v. *United States*, 266 F.2d 378, 384 (10th Cir. 1959); *United States* v. *Westphal*, 304 F.Supp. 951 (D.S.D. 1969); *United States* v. *Baker*, 1 SSLR 3017 (E.D.N.Y. Feb. 9, 1968); *Paszel* v. *Laird*, 308 F.Supp. 741 (E.D.N.Y. 1969); *United States* v. *Huisinga*, 300 F.Supp. 204 (E.D.Ill. 1969); *Murray* v. *Blatchford*, 307 F.Supp. 1038 (D.R.I. 1969).

It is now widely accepted that when a draft board examines a claim for conscientious objection (or any other grounds for reclassification on the merits), and goes beyond the threshold determination of whether the registrant has presented a prima facie case for reopening, it is deemed to have reopened the classification, and the registrant is deemed to be entitled to all procedural rights of personal appearance and appeal, just as if the reopening were de jure and not de facto. *Miller* v. *United States*, 388 F.2d 973 (9th Cir. 1967). See also *United States* v. *Melrose*, ... F.Supp. ....., Cr. 68-124S (D.S.D. Dec. 4, 1969)[7].

It has also been held that the mere sending of a Form 150 to a registrant constitutes a reopening of his classification. *United States* v. *Vincelli*, 215 F.2d 210 (2nd Cir. 1954); *United States* v. *Clark*, 105 F.Supp. 613, 615 (W.D.Pa. 1952). Other cases have held that the allowance of an appearance before the board constitutes a de facto reopening of the classification. *United States* v. *Davis*, 284 F.Supp. 93, 96 (S.D. Iowa 1968).

It has been held that any independent investigation by the local board into the merits of a claim for reclassification constitutes a de facto reopening, entitling the

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7. This is one of the issues before this court in *Mulloy* v. *United States*, No. 655, oral argument held on April 20, 1970, 38 USLW 3420.

claimant to his right of appeal under 32 C.F.R. §1625.13. *United States* v. *Grier*, 415 F.2d 1098 (4th Cir. 1969); *Lane* v. *Allen*, ... F.Supp. ....., 2 SSLR 3129 (N.D.Ohio 1969). The Seventh Circuit stated the principle quite clearly in a case quite similar to the case at bar when it said in *United States* v. *Freeman*, 388 F.2d 246, 249 (7th Cir. 1967):

> "The board deprived him [Freeman] of the right when it, instead of reopening his classification, decided the 'merits' of his claim and notified him by letter of the refusal to reopen, thereby denying him the appropriate procedural safeguards."

B. Post-induction order de facto reopening.

The problem which has arisen in the circuits is whether there can be a de facto reopening for a conscientious objector claim which has matured and been asserted after receipt of an order to report for induction. On this question, the careful analysis of Judge Pettine in *Murray* v. *Blatchford*, 307 F.Supp. 1038, 1055-1057 (D.R.I. 1969), is logically compelling. Judge Pettine delineated specifically the procedures which must be followed by a local board when it receives a claim such as that made by petitioner:

> ". . . the process for the local board upon such a request is a three-fold one: (1) to determine at the threshold the *kind* of claim, that is, whether the claim is one of post-induction notice maturation of conscientious objection, as distinguished from, say, an occupational or hardship claim; (2) to determine whether the claim has matured after the issuance of the order to report; (3) to determine whether the registrant has made a *prima facie* case for conscientious objector status." 307 F.Supp. at p. 1055.

The second step requires a determination of whether there were any facts to refute a claimant's assertion that

his conscientious objection had matured after receipt of the order to report for induction:

> "However, it should be made very clear that the registrant's own claim of maturation after issuance, whether in precise language or not, whether on a Form 150 or not, will carry controlling weight unless the board can find a genuine prior maturation." 308 F.Supp. at 1056.

Finally, the board must determine whether the claim presents a prima facie case. Such a determination does not involve a consideration of the *merits* of the claim:

> "Pursuant to 32 C.F.R. §1625.4 the board must accept the statement of the registrant in requesting reopening as true. Hence, the local board's purview as to the *prima facie* presentation of claim on a request for reopening is limited to the information submitted in the request. If the local board goes beyond the information set forth in the registrant's statement, it is violating 32 C.F.R. §1625.4 and depriving the registrant of his rights to a personal appearance before the board and to an appeal. While the local boards may hold a discretionary interview on the issue of maturation, they take serious risks if they hold such interviews on the issue of *prima facie* presentation of claim." 307 F.Supp. at p. 1056.

In the case at bar the board did hold a discretionary interview, but it is obvious that it looked beyond the threshold determinations outlined by Judge Pettine. Not only did the board look into the date of maturation of the claim, and into the question of whether petitioner had stated a prima facie case for reopening, but it also inquired into the merits of the claim—into Dr. Posner's

sincerity, into his religious beliefs, and into his beliefs concerning war. The interview with the board lasted two hours and thirty-five minutes and the summary of the minutes of the meeting indicates clearly how far the board went into the merits. Obviously such an inquiry constituted a de facto reopening. As Judge Pettine said in *Murray* v. *Blatchford, supra*:

> "This court, however, thinks that the critical issue is whether, at such a discretionary interview, the board makes any inquiry *whatsoever* into the merits of the registrant's claim. See Miller v. United States, 388 F.2d 973 (9th Cir. 1967); United States v. Baker, 1 SSLR 3017 (E.D.N.Y. 1968). If it does, then a reopening must be deemed to have occurred, entitling the registrant to his personal appearance and administrative appellate rights." 307 F.Supp. at 1056.

The recent decision in *United States* v. *Westphal*, 304 F.Supp. 951 (D.S.D. 1969), is also directly on point. In that case, five days after having been mailed an order to report for induction, the registrant requested permission to file as a conscientious objector. Form 150 for conscientious objectors was sent to him by the board, and the registrant's induction was postponed. Just as in the case at bar, Westphal was granted an appearance before the board, and at the appearance the board considered all the various aspects of Westphal's claim for conscientious objector status. The board then refused to reopen Westphal's classification, and, on the date set for induction, Westphal refused to report. The District Court found the defendant not guilty. The Court stated that by holding a hearing and looking into the merits of the registrant's claim for conscientious objection, the local board in effect reopened the classification. Westphal should have had the usual right of appeal following the reopening. The failure

of the board to follow the procedures set down in the regulations constituted a denial of due process.[8]

The conclusion of the court was as follows:

> "It would seem, therefore, that by inviting the registrant to appear in response to his request for consideration as a conscientious objector, the local board not only in effect reopened his classification, but by doing so, canceled his order to report for induction, and that when he was wrongfully denied the right to appeal the action of the board, he was clearly denied not only due process, but that the scant procedural protections of the Selective Service Act as well were clearly not strictly and faithfully followed." 304 F.Supp. at 954.

In *United States* v. *Baker*, 1 SSLR 3017 (E.D.N.Y. 1968), the defendant had filed his conscientious objector claim after being mailed an order to report for induction. The local board granted the registrant a "personal interview." The District Court, Weinstein J., noted that ". . .

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8. The importance of following the regulations was pointed up in the following statement by the Court:

> "Mr. Justice Holmes, in Rock Island, Arkansas, and Louisiana Railroad Co. v. United States, 1920, 254 U.S. 141, 143, 41 S.Ct. 55, 56, 65 L.Ed. 188, stated that 'Men must turn square corners when they deal with the Government.' The Fifth Circuit Court of Appeals, in the case of Robertson v. United States, 404 F.2d 1141 (5th Cir. 1968), in commenting on this statement, states as follows:
>
> 'But the government in dealing with its citizens owes them an equal obligation to right its angles. Since the scope of judicial review is so narrowly restricted in Selective Service cases, we said in Olvera v. United States [1955, 223 F.2d 880, 882]:
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> "* * * (I)t is of the essence of the validity of board orders and of the crime of disobeying them that all procedural requirements be strictly and faithfully followed, and * * * a showing of failure to follow them with such strictness and fidelity will invalidate the order of the board and a conviction based thereon." ' " 304 F. Supp. at 953.

there was no difference between the way the interview was conducted and the way it would have been conducted had there been a reopening of this classification and a full review on the facts to determine sincerity." 1 SSLR 3017. From a look at the record the Court determined that the registrant presented a prima facie case for reopening. Judge Weinstein based this decision partially on the rule in *United States* v. *Gearey*, 368 F.2d 144 (2d Cir. 1966), that a claim for conscientious objector status may be a change over which the registrant has no control. The Court then went on to hold that there had been a de facto reopening, saying:

> "Since a prima facie case was made out and a reopening was required, a full inquiry by the Board on the merits of the claim was necessary. Such a full inquiry and hearing of the registrant's contentions did take place even though it was designated an 'interview' and the local board panel may well have believed that it was only holding a hearing to decide if a reopening was required. The panel's distinction between a regular meeting and a special meeting is of no significance. Under the circumstances, for the purposes of this trial, a reopening of the classification did occur as a matter of law. If it did not occur in fact, it should have occurred and it will be deemed to have occurred in this criminal action." 1 SSLR at 3018-3019.

C. De facto reopening evidenced by length and nature of petitioner's appearance.

If there be any doubt that the local board in the case at bar considered the merits of Dr. Posner's claim, one need only look at the Record. First, the board forwarded Dr. Posner the Form 150. Next, the board granted Dr. Posner a personal interview which lasted two hours and thirty-five minutes. (Ex. 212). At the interview the

board went far beyond the threshhold inquiry into whether there were new circumstances beyond the control of the registrant. It delved into not only the date of maturation of Dr. Posner's beliefs, but also the nature of the beliefs. For example, board members made the following comments: "What we need to know is the reason for your claim as a Conscientious Objector. Please confine your testimony to specific reasons". (Ex. 214). And further on, "We are trying to understand, to come to a conclusion concerning your claim for Conscientious Objector". (Ex. 214). Also, "Do you have anything further to say? Confine this to pertinent remarks concerning your claim for Cons. Obj. In the Selective Service Act it is of course understood that a Cons. Obj. is adverse to taking human life, but you haven't made this very clear". (Ex. 216). And so it was for two hours and thirty-five minutes. While the board made it clear that it was trying to determine when Dr. Posner's claim had matured, it also was trying to determine whether Dr. Posner's religious beliefs qualified him as a conscientious objector.

Even the decision of the local board deals with the merits of the claim. The board checked the box containing the statement:

> "It is the local board's opinion that *the registrant is not a genuine conscientious objector* and that his beliefs are no different now than they were prior to the issuance of his order to report for induction." (Ex. 212) (Emphasis added).

When one considers the fact that the usual preclassification interview for those claiming conscientious objector status lasts approximately 15 to 30 minutes, an interview lasting two hours and thirty-five minutes is remarkable. Certainly such a long and detailed hearing must have involved more than a mere threshold determination of

whether there were grounds for reopening. In other words, Dr. Posner's appearance before the board was more than a mere discretionary interview into the grounds for reopening; it was a personal appearance for the purpose of considering the merits of Dr. Posner's claim.

D. De facto reopening evidenced by court below's recognition that a "personal appearance" occurred.

Moreover, the fact that this was, in effect, a personal appearance is clear from the decision of the Court below:

> "The form was mailed to defendant on March 15, 1967, and he returned it, filled out, on March 29, 1967. On April 3, 1967, the local board rejected the conscientious objector claim. *Defendant requested a personal appearance before the board, and the request was granted.* After the *personal appearance* had taken place, the local board declined to reopen the I-A classification." (Emphasis added).

In other words, as far as the Court of Appeals was concerned, the appearance before the board by Dr. Posner was indeed a "personal appearance" and not a "discretionary interview" as the local board would have it. There is a terribly important difference between a "personal appearance" and a "discretionary interview." Under 32 C.F.R. §1624.1 there is provision for a personal appearance before the local board. Under 32 C.F.R. §1624.2(e) there is a right of appeal from any classification or determination not to reopen made following such personal appearance. There is no such right following a discretionary interview. The Ninth Circuit obviously thought that Dr. Posner had received a personal appearance. Consequently its failure to reverse the conviction as being grounded on an invalid induction error was clearly erroneous.

The mistake of the Court of Appeals is understandable. A discretionary interview held solely for the purpose

of determining whether there were grounds for reopening would not take two hours and thirty-five minutes, and would not involve a thorough consideration of the merits of petitioner's conscientious objector claim. Such a hearing could only be considered a personal appearance under §1624.1 of the regulations, and it is easily seen that anyone describing the event would tend to characterize it as a full-fledged personal appearance, rather than as some cursory discretionary interview. The Ninth Circuit's determination that there was a basis in fact to support the refusal to reopen obviously flies in the face of its recognition that a personal appearance occurred.

Certiorari should be granted so that petitioner will be allowed to receive those vital procedural rights which the court of appeals in effect recognized he was entitled to, but refused to implement.

POINT FOUR

Petitioner Was Coerced into Waiving His Right to Special Findings of Fact under Rule 23(c) of the Federal Rules of Criminal Procedure.

Certiorari should be granted so that this Court can review the lawfulness of the procedure followed in the trial court whereby petitioner, as a condition of having a non-jury trial, was coerced into waiving his right to special findings. The United States Attorney for the Southern District of California has devised a system by which the requirements of Rule 23(c) of the Federal Rules of Criminal Procedure are effectively abolished in his district, and the trial court has evidently concurred. Petitioner requests that this Court take judicial notice of the fact that a defendant who wishes to waive his right to a jury trial in accordance with Rule 23(a) may be compelled to waive his right, provided in Rule 23(c), to special findings of fact.

Dr. Posner was required to sign such a waiver on a mimeographed form which was provided by the prosecutor. (R4)[9]

As the Form (R4) demonstrates, the waiver of special findings of fact is directly tied to the waiver of rights to a jury trial, despite the fact that there is no logical connection between the two waivers and no rule permitting the United States Attorney to attach such a condition to a jury waiver. Because special findings can *only* be had in a non-jury trial, Rule 23(c) in practice no longer exists in the Southern District of California.

Petitioner submits that this is a flagrant violation of due process, which has never been ruled on by this Court. The waiver of rights under Rule 23(c) by petitioner was not a voluntary waiver similar to the waiver of rights to a jury trial. It was an inherently coerced relinquishment of a specifically guaranteed procedural right, waived for the purpose of obtaining the consent of the government to a non-jury trial. This Court should grant certiorari to review this case of first impression and should reverse the conviction because of the plain violation of due process which has occurred.[10]

The importance of the right to special findings is reflected by the decision of the Seventh Circuit in *United States* v. *Morris*, 263 F.2d 594 (7th Cir. 1959), where the

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9. Petitioner's lead counsel, who tried this case in the District Court and has been a member of its bar for 25 years, respectfully represents to the Court that this practice of compulsory waiver is so prevalent in the District Court, and not only in Selective Service prosecutions, that it is regarded by the local bar as the "rule." It is virtually impossible to obtain a non-jury trial in the Southern District of California without waiving the right to special findings.

10. Alternatively, this Court might remand and direct that a hearing be conducted to determine the origin and extent of the practice of compulsory waiver of findings as a condition of non-jury trial, and to fully develop the record of coercion in this case.

Court held that the failure to make special findings of fact upon request was reversible error. Such special findings are *mandatory* where requested by one of the parties to a non-jury criminal trial. Obviously there can be no request where the defendant has been coerced into waiving his rights under Rule 23(c).

When the Advisory Committee proposed Rule 23(c) to this Court the suggested rule provided that the court "may" make special findings. This Court changed "may" to "shall," thereby making special findings mandatory upon request. Orfield, *Trial by Jury in Federal Criminal Procedure*, 1962 DUKE L.J. 29, 73; 2 WRIGHT, *Federal Practice and Procedure*, §374, n. 54.

It has been held that Rule 23(c) "indicates the proper procedure by which a defendant may preserve a question of law for purposes of appeal." *Cesario* v. *United States*, 200 F.2d 232, 233 (1st Cir. 1952).[11]

Some courts have indicated that even without a request there is an obligation on the part of the trial judge to make special findings of fact where the failure to do so would create confusion and obscure the issues for appeal. There was such a holding in a recent prosecution for refusal to report for induction. *Haywood* v. *United States*, 393 F.2d 780 (5th Cir. 1968).

Petitioner waived the right to special findings under Rule 23(c) only because he wanted a non-jury trial. It was important to petitioner that this case be tried before

11. Chief Judge Yankwich has written that he thinks every defendant in a criminal trial is entitled to special findings of fact, despite the fact that trial judges may feel oppressed by the extra work required. *United States* v. *Clark*, 123 F. Supp. 608 (S.D. Cal. 1954). Judge Yankwich stated that he believed that special findings are consistent not only with Rule 23(c) but also with Canon 19 of the Canons of Judicial Ethics of the American Bar Association. See also Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 HARV.L.REV. 1281, 1296 (1952).

a judge and not a jury. Although the right to waive a jury trial is not of constitutional dimensions as is its counterpart, the right to have the case tried by a jury, *Singer* v. *United States*, 380 U.S. 24 (1965), it nevertheless is guaranteed by the rules promulgated by this Court, and requires only the approval of the court and the consent of the government. This Court has indicated the limitations on the government's right to refuse a jury trial waiver:

> "In upholding the validity of Rule 23(a), we reiterate the sentiment expressed in Berger v. United States, 295 U.S. 78, 88, 79 L.Ed. 1314, 1321, 55 S.Ct. 629, that the government attorney in a criminal prosecution is not an ordinary party to a controversy, but a 'servant of the law' with a 'twofold aim . . . that guilt shall not escape or innocence suffer.' It was in light of this concept of the role of prosecutor that Rule 23(a) was framed, and we are confident that it is in this light that it will continue to be invoked by government attorneys. Because of this confidence in the integrity of the federal prosecutor, Rule 23(a) does not require that the Government articulate its reasons for demanding a jury trial at the time it refuses to consent to a defendant's proffered waiver. *Nor should we assume that federal prosecutors would demand a jury trial for an ignoble purpose.*" (*Singer* v. *United States*, 380 U.S. at 37) (Emphasis added).

In trials for refusal of induction, it is usually desirable to waive a jury trial. There are generally very few issues of fact to be determined, whereas the legal issues, particularly the complicated questions of administrative law and practice, and the frequent constitutional ramifications, call for determinations by the judge rather than by a jury. See Selective Service Law Reporter, ¶ 2254.[12]

12. In most Selective Service prosecutions you will find yourself in the situation where the prosecutor and the judge and everybody else agree, that if you want a jury the only thing the jury will decide is whether your client knowingly and willfully

It is also a fact well-known to the Selective Service bar that there is a prevalence of longer sentences in draft cases where a jury trial is demanded and the verdict is guilty. See Selective Service Law Reporter, ¶ 2254; The New Draft Law: A Manual for Lawyers and Counselors (Ginger ed. 1967, 1968 Supp.); *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 Yale L.J. 204 (1956).

The most recent statistics available indicate the fact that in the combined fiscal years 1964 and 1965 the percentage of acquittals for cases tried without jury was 38%, whereas acquittals by juries were only 31%. ADMINISTRA-

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refused either to appear at the induction station or having appeared at the induction station refused to take the step forward. The judge and the prosecutor will probably agree that all other questions are legal questions which are reserved for the Court. Now there may be some circumstances where you can get a judge who will take a broader view of the facts that are involved, certainly if there is some confusion at the induction station, if there is some uncertainty as to whether the person was ordered to take the step forward or wasn't, or whether he was thrown out because of menacing gestures or leaflets or whatever—perhaps you might have an issue of fact under those circumstances. But certainly the question of whether he was not given the classification which he had asked for previously, and whether there was a basis in fact for the Local Board's decision is the kind that I doubt you could get any judge to let go to a jury. Also it is said that there are sometimes sentencing consequences in asking for a jury which would not exist otherwise. Sometimes in imposing sentence the judge will bear in mind the fact that your client cost the government the expense of a jury.

"And finally there is the whole question of the atmosphere of the case, the admissibility of evidence and whatnot. This hybrid kind of mixed law-fact trial, mostly law but some fact, which Selective Service is, is such that there are many narrow and close questions as to whether there is something that can or cannot be heard by the jury; whether something can be heard even by the court or not. The psychological presence of the jury in the jury box or the knowledge of the fact that this is a jury case, I respectfully submit, will have an almost inherent limiting effect on your capacity to persuade the judge who is after all the real decision-maker."

Karpatkin, "The Trial of a Selective Service Case," pp. 74-75. Lecture delivered at Selective Service seminar held at University of Washington Law School, published by the American Civil Liberties Union (Nov. 1969).

TIVE OFFICE OF UNITED STATES COURTS, FEDERAL OFFENDERS IN UNITED STATES DISTRICT COURTS 1965, p. 6.

Because the right to waive a jury trial is of such importance to defendants in Selective Service cases, it is totally unfair to attach a condition to that right which effectively abolishes another procedural right. In effect, the government is saying "we will not permit you to waive jury trial unless you also waive special findings of fact." It is submitted that a refusal to consent to a jury waiver because defendant refused to waive special findings under Rule 23(c) would constitute an "ignoble purpose" under *Singer* v. *United States, supra.*[13]

The assertion of a legal right should never be fraught with consequences by which a defendant relinquishes some other right. An analogy to *United States* v. *Jackson*, 390 U.S. 570 (1968), is clear. There, this Court invalidated that portion of the federal kidnapping law by which a defendant who chose to assert his right to a jury trial faced the consequence of a possible death penalty. A non-jury trial could have only resulted in a life sentence. This Court found it unfair and unconstitutional to attach to the defendant's right of jury trial a condition which would not exist should the defendant allow the case to be

13. In *Singer*, this Court, while holding that in the ordinary case a defendant does not have a right to a non-jury trial, expressly pretermitted the question of whether there might be such a right under "some circumstances." 380 U.S. at 37. It is respectfully submitted that a typical prosecution for induction refusal, such as that in this case, may present the special circumstances, since under existing standards of limited judicial review, see, e.g., *Estep* v. *United States*, 327 U.S. 114 (1946); *Cox* v. *United States*, 332 U.S. 442 (1947), there is very little for a jury to try, and all of the significant questions which will determine conviction or acquittal will generally be regarded by the trial court as legal questions which are beyond the jury's province. See *United States* v. *Boardman*, ... F.2d ..... (1st Cir. 1969), 2 SSLR 3507, 3510, cert. den. ..... U.S. ..... (1970), rejecting "recent suggestions that a broader role for the jury . . . in some cases" be approved by Federal courts. 2 SSLR at 3510.

tried before a judge. The principle is that the assertion of one legal right, whether constitutional or procedural, should never carry with it the relinquishment of another. See also *Alford* v. *State of North Carolina*, 405 F.2d 340 (4th Cir. 1968) prob. juris. noted 394 U.S. 956 (1969).

The same principle is evident in *Speiser* v. *Randall*, 357 U.S. 513 (1958). There this Court said that the plaintiff must not be forced to relinquish the constitutional right of free speech in order to obtain the statutory right to a veterans tax refund. And, in *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), it was held that the privilege of being a teacher must not carry with it the condition that one forfeits the right to free speech.

So, also, the government cannot attach a condition to the privilege of waiving a jury trial. Certainly it cannot require the defendant to give up a right specifically granted by the rules promulgated by this Court solely for those cases in which a jury trial is waived. The effect of such coercion is a violation of due process.

Although the Federal Rules of Criminal Procedure neither limit nor define the boundaries of due process, they are certainly reflective of this Court's interpretation of what due process requires in the federal courts. The principle was stated by Judge Frankel in *United States* v. *Gleason*, 265 F.Supp. 880, 884 (S.D.N.Y. 1967):

> "But it makes obvious practical and doctrinal sense to consider the directly pertinent rules promulgated by the highest Court when appraising the meaning of the Constitution which is ultimately for that Court to expound. Cf. Giordenello v. United States, 357 U.S. 480, 485-486, 78 S.Ct. 1245, 2 L.Ed.2d 1503 (1958)."

By forcing the defendant to give up a procedural right granted by the Federal Rules of Criminal Procedure the

government extinguishes procedural safeguards designed by this Court to guarantee due process under the Fifth Amendment to the Constitution.

CONCLUSION

For the reasons given certiorari should be granted and the judgment should be reversed.

Respectfully,

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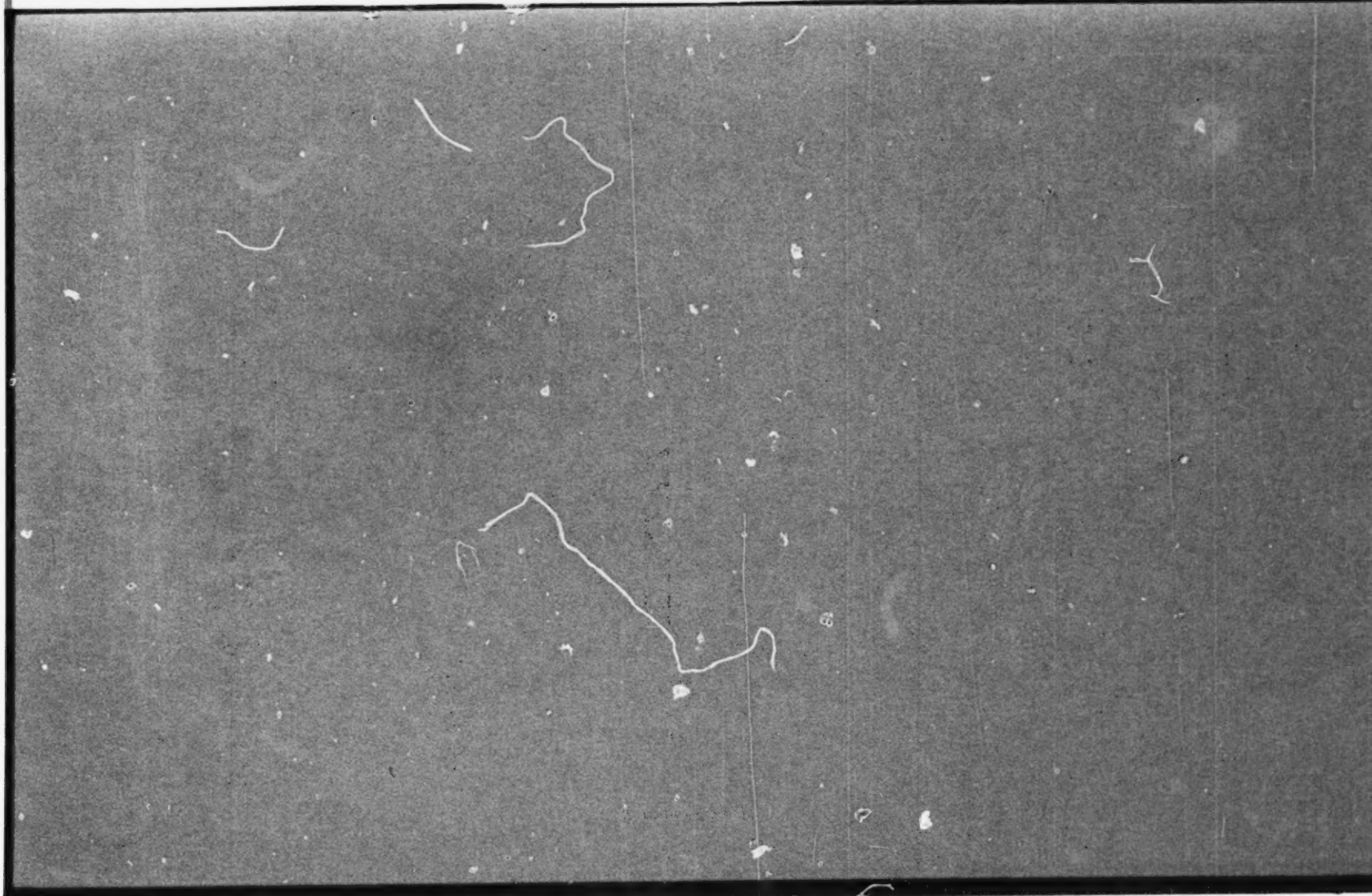

APPENDIX A

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellee,*

vs.

MOSS DAVID POSNER, *Appellant.*

No. 23,885

[February 13, 1970]

Appeal from the United States District Court for the Central District of California

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Before: HAMLEY and CARTER, Circuit Judges, and CROCKER, District Judge*

HAMLEY, Circuit Judge:

Moss David Posner appeals from a judgment convicting him for knowingly failing and refusing to be inducted into the armed forces of the United States in violation of 50 U.S.C.App. § 462. He asserts that his local board should not have reclassified him from II-A to I-A and, in the alternative, the board should have reclassified him III-A or I-O. He argues that the district court should therefore have granted his motion for judgment of acquittal.

Posner was reclassified from II-A (occupational deferment) to I-A (available for military service) on May 12, 1966. He requested a personal appearance and an ap-

*The Honorable M. D. Crocker, United States District Judge for the Central District of California, sitting by designation.

peal from this local board action, not on the ground that his classification should remain II-A, but on the ground that he should be reclassified III-A (hardship). It follows that Posner has no grievance because of the loss of his II-A classification, since he did not ask for its continuance.

Posner is a medical doctor. During his personal appearance before the local board on August 11, 1966, he stated that his wife's parents were medically disabled and dependent upon him. This led his board to reclassify him III-A on September 21, 1966. The State Director appealed their classification and on November 17, 1966, the appeal board reclassified Posner I-A.

Some of the facts which were before the appeal board when it made this reclassification are listed in the margin.[1] Under 32 C.F.R. § 1622.30(b)(2), Posner was entitled to a III-A classification if his induction would result in "extreme hardship" to the Rubensteins. We conclude that the facts summarized in note 1 provide a basis in fact for the appeal board's determination that extreme hardship was not shown.

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1. (1) Posner's father-in-law and mother-in-law, Mr. and Mrs. Rubenstein, did not live with Posner; (2) the Rubensteins had been and were "still quite active in the community when they are able . . ."; (3) Mr. Rubenstein received $155 a month from his veteran's pension and social security; (4) Mrs. Rubenstein was to receive a "small settlement" from her previous employer because of an injury she had suffered; (5) Posner's contribution to the Rubensteins was fifty dollars a month until July, 1966, when he began contributing one half of their support; (6) part of the Rubensteins' expenses were for medical expenditures, and Posner "thought" they were eligible for Medicare (Mr. Rubenstein was sixty-seven years old, and Mrs. Rubenstein was sixty-two years old); and (7) while Posner told the board members that the Rubensteins had so many medical problems that only he could recommend treatment for them, Dr. Nolan Resnich had been treating Mr. Rubenstein at the Veterans' Administration Hospital in Long Beach, California for several years, and Dr. R. H. Schumacher, Mrs. Rubenstein's physician, was apparently familiar with her medical problems.

The remainder of defendant's arguments on appeal are directed to the local board's rejection of his claim to a I-O classification (conscientious objector). Specifically, defendant contends: (1) the denial of his claim to a conscientious objector classification was without basis in fact, arbitrary, and contrary to law; (2) the board erred in considering him non-religious; (3) the absence of religious training and belief is an unconstitutional basis for denying conscientious objector status; (4) defendant was deprived of a fair hearing in his personal appearance before the board when his conscientious objector claim was under consideration; and (5) by refusing to reopen the classification the local board unconstitutionally deprived him of an administrative appeal.

On March 13, 1967, the board sent Posner an order to report for induction on July 6, 1967. On March 14, 1967, the local board received a telegram from Posner requesting SSS Form 150, Special Form for Conscientious Objectors. This was the first intimation given the board that defendant was a conscientious objector.

The form was mailed to defendant on March 15, 1967, and he returned it, filled out, on March 29, 1967. On April 3, 1967, the local board rejected the conscientious objector claim. Defendant requested a personal appearance before the board, and the request was granted. After the personal appearance had taken place, the local board declined to reopen the 1-A classification.

Defendant did not request a conscientious objector classification until after the local board had mailed him an order to report for induction. The board's action on his request was therefore governed by Selective Service Regulation 32 C.F.R. § 1625.2, which provides in part:

> ". . . the classification of a registrant shall not be reopened after the local board has mailed to such regis-

> trant an Order to Report for Induction . . . unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

Under this regulation, reopening of a classification is not allowed unless the registrant's "change of status" occurred after receipt of the induction notice. *United States* v. *Kanner*, 416 F.2d 522, 525 (9th Cir. 1969); *United States* v. *Weersing*, 415 F.2d 130, 134-135 (9th Cir. 1969); *Dugdale* v. *United States*, 389 F.2d 482, 484 (9th Cir. 1968). The local board did not find that there had been a change in Posner's status after he received the induction notice but, on the contrary, expressly found that Posner's beliefs after the induction notice "were no different than before . . . ."

If this determination has a basis in fact, the board acted correctly in denying defendant's request to reopen the classification (1) whether or not his conscientious objection was sincere, (2) whether or not conscientious objection statuts may be limited to persons whose objections are founded upon religious training and belief,[2] and (3) whether or not crystallization of a conscientious objection to war can ever constitute a circumstance "over which the registrant had no control."[3]

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2. The local board expressly found that Posner was not a "genuine" conscientious objector. If the board meant by this that his claimed conscientious objection was not sincerely held, the question presented on appeal, if we had to reach it, would be whether there is a basis in fact for that finding. *Bergman* v. *United States*, ... F.2d ..... (9th Cir. 1969). If the board meant by this finding that Posner's conscientious objections were not based upon religious training and belief, the problem presented on appeal would be whether a statute or regulation based on such a classification is contrary to the First Amendment. This question is now before the Supreme Court in *Welsh* v. *United States*, 404 F.2d 1078 (9th Cir. 1968), *cert. granted*, 396 U.S. 816 (1969), and *United States* v. *Sisson*, 297 F.Supp. 902 (D.Mass.), *hearing granted*, 396 U.S. 812 (1969).

3. A similar "crystallization" problem is now pending before this court, in banc, in *Ehlert* v. *United States*, No. 21930.

In our view the record shows that there was a basis in fact for the board's determination that Posner's beliefs upon which he based his conscientious objection were in existence before he received the induction order. Immediately upon receiving the order to report for induction defendant sent his telegram to the board asking for a conscientious objector form. This almost instant reaction to the notice warranted the board's discounting of Posner's statement that he had only "started thinking" about the matter prior to receiving the notice, and its conclusion that his conscientious objection was firmly held before the notice reached him. Defendant's Form 150, filed March 29, 1967, and a supporting letter, contain statements suggesting that Posner had entertained his conscientious objections to war for some time.

Finally, defendant's assertion that the hearing given him by the local board on his conscientious objection claim was not fair is without substance. Nor did the subsequent failure of the board to reopen the classification deprive defendant of due process of law by denying him the right to an administrative appeal. The local board proceeded in strict conformity with 32 C.F.R. § 1625.4, and the Selective Service regulations do not provide for appellate review of a local board's decision not to reopen a registrant's classification. *Cf.* 32 C.F.R. §§ 1625.4, 1626.1-1626.61. Inability to appeal from a refusal to reopen does not deny due process. See *Boyd* v. *United States*, 269 F.2d 607, 611 (9th Cir. 1959).

Affirmed.

As amended by Order of March 10, 1970.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Tuesday, March 10, 1970

Before: HAMLEY and CARTER, Circuit Judges, and CROCKER, District Judge

Order Denying Petition for Rehearing

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of appellant filed February 24, 1970 and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. .....

OCTOBER TERM, 1969

MOSS DAVID POSNER,
Petitioner,

vs.

UNITED STATES

Order Extending Time to File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 9, 1970.

/s/ W. O. Douglas
Associate Justice of the Supreme Court of the United States

Dated this 20th day of April, 1970.

APPENDIX D

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V

CRIMINAL PROCEEDINGS AND CONDEMNATION OF PROPERTY

[SECTION 1.] No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Proposed September 25, 1789; ratified December 15, 1791.

Congress declared in Section 456 (j) of the Universal Military Training and Service Act, 50 U.S.C. App., that:

> "Nothing contained in this Title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States, who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."

Congress declared in Section 1 of the Act: "Policy and intent of Congress:

> "(c) The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."

Section 1625.2 of the Selective Regulations (32 C.F.R. §1625.2 (E. O. 10292, 16 F. R. 9862, Sept. 28, 1951)) provides:

> "*When registrant's classification may be reopened and considered anew.*—The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; *provided*, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252), unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

1624.1 Opportunity to appear in person.

(a) Every registrant after his classification is determined by the local board, except a classification which is determined upon an appearance before the local board under the provisions of this part, shall have an opportunity to appear in person before the member or members of the local board designated for the purpose if he files a written request therefor within 30 days after the local board has mailed a Notice of Classification (SSS Form 110) to him. Such 30 day period may not be extended.

(b) No person other than a registrant shall have the right to appear in person before the local board, but the local board may, in its discretion, permit any person to appear before it with or on behalf of a registrant: *Provided,* That if the registrant does not speak English adequately he may appear with a person to act as interpreter for him: *And provided further,* That no registrant may be represented before the local board by any one acting as attorney or legal counsel.

1624.2(e) Each such classification or determination not to reopen the classification made under this section shall be followed by the same right of appeal as in the case of an original classification.

1625.13 Right of appeal following reopening of classification.

Each such classification shall be followed by the same right of appearance before the local board and the same right of appeal as in the case of an original classification.

1625.14 Cancellation of Order To Report For Induction or for Civilian Work by reopening of classification.

The reopening of the classification of a registrant by the local board shall cancel any Order To Report For Induction (SSS Form No. 252) or Order To Report for Civilian Work and Statement of Employer (SSS Form No. 153) which may have been issued to the registrant, except that if the registrant has failed to comply with either of those orders, the reopening of his classification thereafter by the local board for the purpose of placing him in Class IV-C or Class V-A shall not cancel the order with which he failed to comply.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1550

MOSS DAVID POSNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

After a non-jury trial in the United States District Court for the Central District of California, petitioner was convicted of knowingly refusing to submit to induction into the Armed Forces of the United States, in violation of 50 U.S.C. App. 462. He was sentenced to imprisonment for three years.

Petitioner, now a doctor, registered with his local Selective Service board in 1954. On May 12, 1966 (after a series of student and occupational defer-

ments), he was reclassified from II-A (occupational deferment) to I-A (available for military service). He requested a personal appearance and appeal, claiming entitlement to a III-A classification (hardship deferment) (SSF 109).[1] In support of this claim, he told the board that his wife's parents were medically disabled and dependent upon him (SSF 137-138). On September 21, 1966, the local board reclassified him III-A; the State director thereafter appealed this classification (SSF 144). On November 17, 1966, the State appeal board reclassified petitioner I-A by a 3-0 vote (SSF 151).

On March 13, 1967, the local board sent petitioner an order to report for induction on July 6, 1967 (SSF 172). The following day the board received a telegram from petitioner requesting a Form 150, the special form for conscientious objectors (SSF 173). Petitioner had never before given any intimation to the board that he possessed conscientious objector beliefs. On April 27, 1966, October 26, 1966, and again on January 16, 1967, petitioner had inquired as to whether he would be permitted to join the California National Guard (SSF 101, 148, 161).

On March 15, 1967, the local board mailed the form to petitioner. It was returned filled out on March 29, 1967 (SSF 174). On April 3, 1967, the local board rejected the conscientious objector claim, expressly finding that petitioner's beliefs after the induction

[1] "SSF" refers to petitioner's Selective Service File, a copy of which we are lodging with the Clerk of this Court.

notice "were no different than before" and that he was not "a genuine Conscientious Objector" (SSF 179). After notice that the local board had refused to reopen his classification, petitioner wrote to the board that his beliefs "were not formulated nor crystallized until after the induction notice was received" (SSF 183). At petitioner's request the local board granted a courtesy interview; at this appearance petitioner was told that he would have all the time he needed to present his case (SSF 271) and that the board was trying to determine the point at which his conscientious objector beliefs crystallized (SSF 214, 215, 217). Petitioner devoted his entire appearance, lasting two hours and thirty-five minutes, to reading prepared statements (SSF 214-216). Thereafter, the local board declined to reopen his I-A classification.

The court of appeals affirmed the conviction (Pet. App. A1-A5). It found "a basis in fact for the board's determination that [petitioner's] beliefs upon which he based his conscientious objection were in existence before he received the induction order" (Pet. App. A5).[2] In view of this determination, the court found that the issues presented in *Welsh* v. *United*

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[2] The court of appeals observed that petitioner's "almost instant reaction to the [induction] notice warranted the board's discounting of [his] statement that he had only 'started thinking' about the matter prior to receiving the notice, and its conclusion that his conscientious objection was firmly held before the notice reached him" (Pet. App. A5). The court also pointed out that petitioner's "Form 150, * * * and a supporting letter, contain statements suggesting that [petitioner] had entertained his conscientious objections to war for some time" (*ibid.*).

States, No. 76, 1969 Term, decided June 15, 1970, and *Ehlert* v. *United States*, No. 1383, 1969 Term, certiorari granted, May 4, 1970, were not relevant to the disposition of the instant case (Pet. App. A-4). The court also found a basis in fact to support the rejection of petitioner's claim of hardship deferment.[3]

Petitioner's claim to classification as a conscientious objector was rejected under 32 C.F.R. 1625.2, which provides that a local board shall not reopen a registrant's classification after an induction notice has been sent, unless the board specifically finds that there has been a change in his status resulting from circumstances over which he has no control. This provision has uniformly been interpreted as not allowing re-

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[3] The court set forth the facts upon which it relied (Pet. App. A2, n.1):

"(1) Posner's father-in-law and mother-in-law, Mr. and Mrs. Rubenstein, did not live with Posner; (2) the Rubensteins had been and were 'still quite active in the community when they are able . . .'; (3) Mr. Rubenstein received $155 a month from his veteran's pension and social security; (4) Mrs. Rubenstein was to receive a 'small settlement' from her previous employer because of an injury she had suffered; (5) Posner's contribution to the Rubensteins was fifty dollars a month until July, 1966, when he began contributing one hal. of their support; (6) part of the Rubensteins' expenses were for medical expenditures, and Posner 'thought' they were eligible for Medicare (Mr. Rubenstein was sixty-seven years old, and Mrs. Rubenstein was sixty-two years old); and (7) while Posner told the board members that the Rubensteins had so many medical problems that only he could recommend treatment for them, Dr. Nolan Resnich had been treating Mr. Rubenstein at the Veterans' Administration Hospital in Long Beach, California for several years, and Dr. R. H. Schumacher, Mrs. Rubenstein's physician, was apparently familiar with her medical problems."

opening unless the registrant's change in status occurred *after* receipt of the induction notice. *United States* v. *Kanner*, 416 F. 2d 522, 525 (C.A. 9); *Dugdale* v. *United States*, 389 F. 2d 482, 484 (C.A. 9); *United States* v. *Griffin*, 378 F. 2d 899 (C.A. 2); *United States* v. *Kroll*, 400 F. 2d 923 (C.A. 3), certiorari denied, 393 U.S. 1069; *United States* v. *Helm*, 386 F. 2d 434 (C.A. 4), certiorari denied, 390 U.S. 958; *Nelloms* v. *United States*, 399 F. 2d 295 (C.A. 5); *United States* v. *Taylor*, 351 F. 2d 228 (C.A. 6); *United States* v. *Porter*, 314 F. 2d 833 (C.A. 7); *Salamy* v. *United States*, 379 F. 2d 838 (C.A. 10).

Initially, we point out that the court below properly concluded that the local board could justifiably find petitioner's conscientious objection (if it existed at all) to have crystallized *prior* to receipt of an induction notice. Despite their disagreement on the late crystallization issue, the various courts of appeals are in accord that in this situation, when a timely claim is not made, exemption may be denied on that basis alone. *United States* v. *Gearey*, 368 F. 2d 144 (C.A. 2), certiorari denied, 389 U.S. 959; *Davis* v. *United States*, 374 F. 2d 1 (C.A. 5); *United States* v. *Taylor*, 351 F. 2d 228 (C.A. 6); *United States* v. *Beaver*, 309 F. 2d 273 (C.A. 4), certiorari denied, 371 U.S. 951; *United States* v. *Kanner*, 416 F. 2d 522 (C.A. 9); *Boyd* v. *United States*, 269 F. 2d 607 (C.A. 9); *Keene* v. *United States*, 266 F. 2d 378 (C.A. 10); *United States* v. *Schoebel*, 201 F. 2d 31 (C.A. 7). We recognize, however, that this Court has recently granted certiorari in *Ehlert* v. *United States*, No. 1383, 1969

Term,[4] to consider whether the maturation of conscientious objector beliefs after the receipt of an induction notice constitutes a circumstance beyond the control of the registrant entitling him to reopening.[5]

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[4] While petitioner suggests that the dissent in *Ehlert* stands for the proposition that Congress, in creating the conscientious objector classification, "nowhere, even by implication, set a deadline for its implementation" (Pet. 9), this is a misreading of the dissent, which in fact expressed concern that a claim be timely made. It recognized that "the enforcement of orderly procedures may well require default to be imposed for failure of a registrant to claim in timely fashion" and that in evaluating a conscientious objector claim the board must consider whether the belief "did in fact crystallize after receiving notice of induction and thus constitute a change in status" (No. 21,930 (C.A. 9), slip op., p. 11).

[5] Petitioner contends that he is a non-religious conscientious objector and that denial of his C.O. claim for lack of religiosity violates the First Amendment. He also argues that the granting of a courtesy interview by his local board constituted a de facto reopening of his classification. However, the situation here is factually distinguishable from those involved in the recently decided cases of *Welsh* v. *United States*, *supra*, and *Mulloy* v. *United States*, No. 655, 1969 Term, decided June 15, 1970, and there is no occasion to vacate petitioner's conviction and remand the case for reconsideration in light of those decisions. In our view, both *Welsh* and *Mulloy* presuppose a properly presented and timely tendered claim of C.O. status, and therefore nothing in those decisions is contrary to the result reached below here, since petitioner's C.O. claim was admittedly filed after he had been ordered to report for induction, while his C.O. beliefs (if any) arose prior to that time.

Similarly, petitioner's claim that "it is virtually impossible" to obtain a non-jury trial in the Central District of California without waiving the right to special findings (Pet. 33, n.9) has no support in the record. It was not urged upon either the district court or the court of appeals and is unsupported by anything beyond petitioner's mere allegation.

In view of that fact, the Court may wish to defer action on the instant petition pending its decision in *Ehlert*.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1970.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. [redacted] 151

MOSS DAVID POSNER,

Petitioner,

—v.—

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO MEMORANDUM FOR THE UNITED STATES

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PETITIONER'S REPLY TO MEMORANDUM FOR THE UNITED STATES

This brief is addressed to certain of the statements and arguments contained in the memorandum for the United States submitted by the Solicitor General, in response to the petition for certiorari.[1]

The Government's contention that a *de facto* reopening did not occur in this case is based on a misreading of the record, and, we submit, a misunderstanding of the doctrine. Moreover, the Government's position underscores a conflict between the circuits which only this Court can resolve.

[1] Acknowledging the possible impact on this case of *Ehlert* v. *United States*, No. 1383, 1969 Term, No. 120, 1970 Term (see petition, pp. 15-19), the Solicitor General does not urge denial of the petition, but suggests that "the Court may wish to defer action on the instant petition pending its decision in *Ehlert*" (p. 7).

To begin with, the Government's memorandum misrepresents one of the most crucial facts in this case. In describing the "courtesy interview"[2] which petitioner had with his local draft board concerning his claim of conscientious objection, it states that "Petitioner devoted his entire appearance, lasting two hours and thirty-five minutes, to reading prepared statements" (p. 3). A reading of the board's summary shows, on the contrary, that members of the board took an active part in the hearing and questioned petitioner closely about the merits of his claim. See petition, pp. 29-31.

The Government's memorandum implies (page 6, fn. 5) that there can be no *de facto* reopening of a conscientious objector claim where the claim is made subsequent to issuance of an order to report for induction. No rationale is offered for this argument and it is not supported by any case law. On the other hand, this Court held in *Mulloy* v. *United States,* —— U.S. ——, 3 SSLR 3011, 3013 (June 15, 1970):

> "The board could not deprive the petitioner of the procedural protections attending reopening by making an *evaluative determination* of his claim while purportedly declining to reopen his classification." (Emphasis added.)[3]

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[2] The Solicitor General uses the words "courtesy interview" and "appearance" synonymously (p. 3). But there is no explanation or even comment on the significance of the characterization by the *court below* of Dr. Posner's lengthy session with the local board as a "personal appearance." See petition, pp. 31-32.

[3] The Solicitor General argues that *Mulloy* is distinguishable on two grounds: first, that it presupposes a "timely tendered claim of C.O. status" (p. 6, fn. 5); and second, that it is evident that Dr. Posner's C.O. views arose prior to the induction order. *Ibid.* We contend that the Government is reading the unanimous decision

Unquestionably, the local board in this case made an "evaluative determination" of petitioner's claim while purportedly declining to reopen his classification. As the cases cited on pages 25-29 of the petition for certiorari demonstrate, such a *de facto* reopening can occur in claims for conscientious objection made after as well as before issuance of an induction order.

One recent circuit court decision directly in conflict with the Ninth Circuit on the doctrine of *de facto* reopening is *United States* v. *Noonan,* —— F.2d ——, 2 SSLR 3588 (3d Cir., April 6, 1970) which was not mentioned in the petition. There the registrant did not make his claim for conscientious objector classification until after he had received an order to report for induction *and had refused induction at the induction station.* The local board held a discretionary interview with the registrant and found 1) that there was no change in status, 2) that his claim did not have merit, and 3) that he did not meet the criteria for conscientious objection. It refused to reopen his classification. The Third Circuit reversed Noonan's conviction for induction refusal, holding that the action of the board constituted a *de facto* reopening. The Court said:

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of this Court in *Mulloy* much too narrowly, and we respectfully suggest that the Government's uncertainty of the soundness of its view is reflected by its acknowledgment that this case may be governed by *Ehlert.* Insofar as concerns whether Dr. Posner's views arose pre- or post-induction order, the Government, in assuming the truth of a hotly-contested fact, is obfuscating the real issue. The question is not the *merits* of when Dr. Posner's views matured, but rather, whether the circumstances of his interrogation by the board indicate (1) that he was improperly denied reopening under the erroneous *Ehlert* rationale, and (2) that a *de facto* reopening occurred.

> "It is a blatant inconsistency to say that the board did not in fact reopen and 'consider anew' appellant's classification when it made specific findings as to his conscientious objector claim. This particular claim for exemption had never before been presented to the board. It was new information. The board cannot logically insist that it did not consider a new classification when it made findings that his 'claim did not have merit,' that he 'does not meet the criteria for C.O.,' and that there was 'no change in [his] status over which [he] had no control.' These conclusions were not divined by soothsayers from smoldering entrails. They were adduced from what the registrant told the board at the interview and from what he wrote on SSS Form 150." 2 SSLR 3589-3590.

The Court, in *Noonan,* said that it was bound to look at "the substance and not the form of the board's proceedings" and held that it would be a denial of procedural due process to permit a local board to prevent "administrative appeal from a refusal to reclassify by casting it in a form of a refusal to reopen." The board erred because "It affixed a label proclaiming it had not done that which, in fact, it did do." 2 SSLR at 3590.[4]

The summary of Dr. Posner's appearance before the board indicates clearly that the board did more than simply consider the date of maturation of his beliefs. It investigated his sincerity, his interest in noncombatant service and alternative service, and the religious basis for his beliefs.

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[4] Circuit Judge Aldisert, writing for the Court, aptly quoted from Plautus' *Mostellaria,* Act III 2.105: *"Simul flare sorbereque haud facile est.* To blow and to swallow at the same time is not easy." 2 SSLR at 3590.

In its final determination, the board checked a box stating that:

> "It is the local board's opinion that the registrant is not a genuine conscientious objector and that his beliefs are no different now than they were prior to the issuance of his order to report for induction."

There is no way of determining from the mere check of this box whether the board based its decision solely on the date of maturation, or on the merits of the claim, or on both grounds.[5]

This method of checking the box next to the above quoted paragraph has been declared "defective" by the Second Circuit in *Paszel* v. *Laird,* —— F.2d ——, 2 SSLR 3591, 3594 (2d Cir., April 8, 1970). In *Paszel,* the Court pointed out that the box checked does not indicate that the individual was a conscientious objector both before and after receipt of the order to report for induction, but simply that his beliefs had not changed. It held that under the doctrine of *United States* v. *Gearey,* 368 F.2d 144 (2d Cir. 1966), to deny a post-induction order claim, it must be clear from the board's summary that it rationally found maturation prior to receipt of the induction order. Maturation thereafter would entitle the registrant to a reopening. In *Paszel* the

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[5] Where an ambiguous local board record fails to clearly demonstrate whether the board based a denial of classification on a proper or an impoper reason, the board action is unlawful, and a remand should be directed. See *United States* v. *St. Clair,* 293 F. Supp. 337, 344 (E.D.N.Y. 1968); *United States* v. *Englander,* 271 F. Supp. 182 (S.D.N.Y. 1967); see also *United States* v. *Jakobson,* 325 F.2d 409, 416 (2d Cir. 1963), aff'd sub nom. *United States* v. *Seeger,* 380 U.S. 163 (1965); *United States* v. *James,* 417 F.2d 826, 832 (4th Cir. 1969).

Court remanded for a hearing to determine precisely what the board found. The court said:

> "Despite, or perhaps because of, the narrowness of the scope of review of actions of selective service boards, it is important for courts to know the ground upon which the board acted. We recognize that the Selective Service System is not subject to the Administrative Procedure Act with its requirement of reasons for the denial of an application, 5 U.S.C. §§551, 555(e), and that boards of volunteer laymen cannot be expected to express themselves with the elaboration of expert regulatory agencies. Still a serious claim like Paszel's deserved something better than an ambiguous checkmark." 2 SSLR 3594.

Dr. Posner deserved more than an ambiguous checkmark. Yet the Ninth Circuit appears to be in conflict with the Second Circuit on this very issue. The court below, apparently because of its holding in *Ehlert* v. *United States,* 422 F.2d 332 (9th Cir. 1970), cert. granted —— U.S. ——, Oct. Term 1970, No. 120, does not believe that local boards are required to follow any particular procedure in ruling on conscientious objector claims submitted after receipt of an order to report for induction.

The Ninth Circuit has recognized the concept of *de facto* reopening, *Miller* v. *United States,* 388 F.2d 973 (9th Cir. 1967), but like the Solicitor General it does not believe the rule applies to conscientious objector claims submitted after receipt of an induction order. It therefore appears that there is a serious conflict between the Ninth and the Third Circuits, with the Second Circuit likely to follow the Third. Under the current ambiguity of the law a registrant from

a local board located in the Second Circuit has different defenses depending on whether he is prosecuted in New York (*Gearey*), New Jersey (*Noonan*) or California (*Posner*). Certiorari should be granted to settle this inter-circuit conflict on important questions of Selective Service law.[6]

September 23, 1970

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[6] The Government also argues that this Court should not consider petitioner's contention that he was forced to waive his right to special findings under Rule 23(c) of the Federal Rules of Criminal Procedure. See petition, pp. 32-39. The only grounds urged by the Government are that this issue was not raised below. Yet this Court may, in unusual circumstances, consider questions not raised below. *Duignan* v. *United States*, 274 U.S. 195, 200 (1927) and cases cited therein; see *Hormel* v. *Helvering*, 312 U.S. 552, 555-560 (1941). The forced waiver of special findings by the District Court for the Central District of California, is a highly unusual situation. It involves a blatant disregard for this Court's criminal rule-making power under 28 U.S.C. §2072. This Court should rule on this question in the exercise of its "supervisory power to formulate and apply proper standards for the enforcement of the criminal law in the federal courts . . ." *Marshall* v. *United States*, 360 U.S. 310, 313 (1959); see *McNabb* v. *United States*, 318 U.S. 332, 341 (1943).